Supreme Court, U.S.
FILED
DEC 18 2003
OFFICE OF THE CLERK

No. 02-1624 (37)

In The

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT,
Petitioner,

v.

MICHAEL A. NEWDOW, ET AL.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF WALLBUILDERS, INC.
in support of the *Petitioner*,

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INTEREST OF *AMICUS CURIAE*[1]

WallBuilders, Inc. is a 501(c)(3) organization that is dedicated to the restoration of the moral and religious foundation on which America was built. As such, the organization has a direct interest in seeing that students are allowed to say the full and official version of the Pledge of Allegiance in their schools. WallBuilders has a large base of supporters who are equally concerned with this issue.

This brief is filed pursuant to the consent of the counsel of record of all parties.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Ninth Circuit erred in ruling that the Elk Grove Unified School District's policy of having elementary aged school children recite the Pledge of Allegiance is unconstitutional. In ruling the Pledge unconstitutional, the Ninth Circuit overlooked this Court's *dicta* concerning the constitutionality of the Pledge. This brief will show that certain types of *dicta* should be viewed as binding authority or nearly binding authority. The Ninth Circuit has itself decided that this Court's *dicta* are on the upper end of the precedential continuum. The Ninth Circuit should have been guided by this Court's *dicta* and ruled the policy of the school district constitutionally sound.

The Ninth Circuit also misapplied this Court's rulings in *Lynch v. Donnelly*, 465 U.S. 668, 676, 693, 716, (1984), and *Lee v. Weisman*, 505 U.S. 577 (1992), when it ruled that the Pledge of Allegiance was unconstitutional when recited in public schools. A proper understanding of *Lynch* shows that the use of the Pledge in public schools is constitutional.

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[1] No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the *Amicus Curiae*, its members, and its counsel.

The Ninth Circuit also failed to recognize *Lee's* self-limiting principles and misapplied the effect of its ruling on the present case. There are several significant factual differences between *Lee* and the present case that the Ninth Circuit ignored.

ARGUMENT

The second question certified by this Court asks "[w]hether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words 'under God,' violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment."[2] A negative answer could be arrived at two ways. Either the inclusion of the phrase "under God" could be declared unconstitutional in all settings including the one examined here or the use of the phrase could be declared unconstitutional only in the specific context being examined by the certified question. Interestingly, the Ninth Circuit originally held both the former and the latter, *Newdow v. United States Cong.*, 292 F.3d 597, 612 (9th Cir. 2002) (withdrawn), then modified its opinion to limit it to the latter, *Newdow v. United States Cong.*, 328 F.3d 466, 490 (9th Cir. 2002).

While numerous reasons could be advanced as to why "under God" does not violate the Establishment Clause, only one will be advanced here, namely the numerous pronouncements from this Court as to the Pledge's constitutionality. Indeed, one could speculate that becoming convinced of this fact too late, the Ninth Circuit modified its opinion in hopes that the new opinion might survive review by this Court. Therefore, after demonstrating why the Pledge *per se* is constitutional, this brief will go on to show why using the Pledge in the public school setting is also constitutional.

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[2] This brief will only address issues related to this question.

I. THE NINTH CIRCUIT'S OPINION SHOULD BE REVERSED BECAUSE IT ERRED BY NOT GIVING DEFERENCE TO THE *DICTA* OF THIS COURT WHICH HAS STATED THAT THE PLEDGE OF ALLEGIANCE IS CONSTITUTIONAL.

The debate between the majority and minority opinions below, as well as Judge O'Scannlain's dissent from denial of rehearing was very largely over whether to decide the issue of the constitutionality of the Pledge of Allegiance by trying to extend the logic of this Court's Establishment Clause precedent or by using this Court's *dicta* regarding the Pledge of Allegiance. *Newdow v. United States Cong.*, 328 F.3d 466, 471-82 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing *en banc*); *id.* at 482-90 (majority opinion); *id.* at 490-93 (minority opinion).[3]

The problem with trying to apply this Court's precedent in a new context is that this Court's Establishment Clause jurisprudence has often been unpredictable, as various Justices of this Court have acknowledged. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 107-12 (1985) (Rehnquist, J., dissenting) (stating that the application of the Establishment Clause since the late 1940s has little value because it has no basis in history and "is difficult to apply and yields unprincipled results."). With this type of unpredictable Establishment Clause jurisprudence, this Court should adopt the approach of the dissent below, which has also been employed in the Seventh Circuit's decision in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437, 439 (7th Cir. 1992). Following this Court's *dicta* would have been the best alternative for the Ninth Circuit. As the Seventh Circuit aptly stated, "[a]n inferior court had best respect what the majority [of the United States Supreme Court] says rather than read between the lines. If the Court

[3] This was also true of the original, now withdrawn opinion, *Newdow v. United States Cong.*, 292 F.3d 597 (2002).

proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." *Id.* at 448.

Below, the majority opinion recognized that this Court has stated in *dicta* that the words "one nation under God" in the Pledge of Allegiance are constitutional. *Newdow*, 328 F.3d at 489. However, the majority did not give deference to this Court's *dicta*, as it stated it would. *Id.* The question for this Court to resolve is whether the Ninth Circuit gave inadequate deference to this Court's *dicta*. For the reasons stated in the discussion below, the Ninth Circuit should have been guided, if not bound, by this Court's *dicta* regarding the constitutionality of the Pledge.

Dictum is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication . . . ." Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 710 (1999). Judges and attorneys often divide *dicta* into *obiter dicta* and judicial *dicta* to determine the precedential value of individual *dictum*. *Id.* at 712-13. *Obiter*, or mere, *dicta* is an opinion expressed in passing and has less persuasive value. *Id.* at 713. Judicial *dicta* are "court's reasoned consideration and elaboration upon a legal norm" and have much more persuasive authority. *Id.* at 713-14.

In fact some courts, including this Court, give judicial *dicta* great weight. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court adhered to judicial *dicta* which was regarded as a "well-established rationale upon which the Court based the results of its earlier decisions." *Id.* at 67. Similarly, this Court has stated that the "principle of *stare decisis* directs us to adhere not only to the holdings of . . . prior cases, *but also* to . . . explications of the governing rules of law." *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (emphasis added).

Likewise, the Third Circuit Court of Appeals has noted that "[a] . . . distinction has been drawn between

'judicial *dictum*' and '*obiter dictum*': Judicial *dicta* are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to decision. A judicial *dictum* may have great weight." *Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 978 n.39 (3d Cir. 1980). Indeed, judicial *dicta* are of such serious consequence that some courts consider judicial *dicta* issued by supreme courts to be binding precedent: "A Wisconsin court has stated it thus: 'When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision.'" *Id.* (citation omitted).

Furthermore, the distinction between *obiter dictum* and *judicial dictum* is not a bright line. Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 717-18 (1999). Hard and fast divisions "are probably wrong" and can lead to "intellectual chicanery." *Id.* at 730, 776. It is not easy to determine what constitutes judicial *dictum*. *Id.* at 735. In fact, *dicta* are better thought of as being on a continuum. *Id.* at 740. Under this view, *obiter dicta*, in which a court has not deliberated over what it has said, *see id.*, rest at the lower end of the continuum; judicial *dicta* rest at the upper end of the spectrum and should guide future litigation, *id.* at 730; but other "shades" of *dicta* exist between the two extremes and should be given various degrees of weight. Therefore, it is important under this view to realize that *dicta*, even *dicta* other than that which is *technically* judicial *dicta*, can lie very close to that end of the continuum and can be worthy of receiving precedential or near-precedential value. Certainly, the Seventh Circuit, unlike the Ninth Circuit, considered this Court's Pledge *dicta* either to be judicial *dicta* or to be sufficiently close to that end of the spectrum to guide the litigation before it. *See infra*.

Ironically, the Ninth Circuit itself has placed *dicta* issued by this Court on the upper end of the continuum. *See United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996). According to the Ninth Circuit, Supreme Court *dicta* is to be treated "with due deference." *Id.* One Ninth Circuit judge has stated that this Court's *dicta* must not be discarded lightly. *Navajo Nation v. U.S. Dept. of Health and Human Services*, 285 F.3d 864, 877 (9th Cir. 2002) (Fletcher, J., dissenting). Another stated, "*[d]icta* of the Supreme Court have a weight that is greater than ordinary judicial *dicta* as prophecy of what the Court might hold. We should not blandly shrug it off because they were not a holding." *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring in part and dissenting in part). The Ninth Circuit, therefore, has placed Supreme Court *dicta* high on the continuum giving it great weight—even when that the *dictum* is not judicial *dictum*. For example, this Court's *dicta* at issue in *Zal* must be considered *obiter dicta*, yet Judge Noonan pointed out the weight they deserved. *See id.*

Certainly, this Court's *dicta* regarding the Pledge of Allegiance are worthy of even more weight since they are much closer to the judicial *dicta* end of the continuum. While the constitutionality of the Pledge may not have been extensively briefed and argued, the pertinent Establishment Clause test and principles *were* briefed and argued in all the cases in which the Pledge was used as an illustration. For example, this Court has stated, "Our previous opinions have considered in *dicta* the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989). This Court also stated that one's "religiously based refusal" to recite the Pledge should not interfere with the right of others to recite it. *See Newdow*, 328 F.3d at 492 (Fernandez, J., concurring in part and dissenting in part) (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). In fact, five current Justices of this Court, as well as eight

prior Justices, have recognized that including "under God" in the Pledge of Allegiance does not impose a danger to society by establishing a theocracy or inhibiting one's religious beliefs. *Id.* at 491 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03, 672-73 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 676, 693, 716, (1984); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 306-08 (1963).

The majority opinion below dismissed this Court's *dicta* because this Court has never *directly* addressed the issue and has not applied the Establishment Clause tests to it. *Newdow*, 328 F.3d at 489. Based on the Ninth Circuit's own precedent, Supreme Court *dicta* should be given great deference. *Baird*, 85 F.3d at 453. This Court has stated multiple times that the Pledge does not violate the Establishment Clause. *See Newdow*, 328 F.3d at 491 (Fernandez, J., concurring in part and dissenting in part) (noting cases cited in the previous paragraph). Because this Court has declared the Pledge to be constitutional on multiple occasions, and because each of the cases addressed basic First Amendment principles, this Court did not make those statements regarding the Pledge without due consideration. Therefore, the Ninth Circuit erred by not being guided by the applicable *dicta* from this Court. Had it been so guided, it would have upheld the constitutionality of the Pledge. Indeed, this Court has already decided the issue.

II. THE NINTH CIRCUIT'S OPINION SHOULD BE REVERSED BECAUSE IT MISAPPLIED THIS COURT'S RULINGS IN *LYNCH V. DONNELLY* AND *LEE V. WEISMAN* TO HOLD THE PLEDGE UNCONSTITUTIONAL IN PUBLIC SCHOOLS.

Just as this Court's *dicta* indicates the constitutionality of the Pledge *per se*, so it indicates the constitutionality of the Pledge in the public school setting. Indeed, the Ninth Circuit admitted as much and attempted,

albeit feebly, to deal with this fact. The Ninth Circuit wrote,

> Our opinion, however, is not inconsistent with this *dicta*. In *Allegheny*, the Court noted that it had "considered in *dicta* the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-03. And in *Lynch*, the Court observed that students recited the pledge daily, but only to support its point that there is a long tradition of "official acknowledgment" of religion. 465 U.S. at 674, 676. Neither of these two references speaks to the issue here. We may assume *arguendo* that public officials do not unconstitutionally endorse religion when they recite the Pledge, yet it does not follow that schools may coerce impressionable young school children to recite it, or even to stand mute while it is being recited by their classmates.

Newdow v. United States Cong., 328 F.3d at 489.

Even on the face of this assertion, one might believe that the Ninth Circuit had come to the exact opposite conclusion from the one justified by this Court's pronouncement in *Lynch*. One might logically conclude that this Court had given the Pledge's use in public schools a clean bill of health and that the Ninth Circuit's use of the word "coerce" was gratuitous—especially in light of the record in this case (which clearly indicates that the student participants are willing participants).

However, were one inclined not to come to this conclusion merely on the face of the Ninth Circuit's assertion, one need merely look at the larger context of the *Lynch* quotation to see that the Ninth Circuit's

characterization of it is not accurate. It is true that this Court in *Lynch* noted the recitation of the Pledge "by many thousands of school children every year," as an example of official acknowledgement of religion." 465 U.S. at 676. However, this Court said much more that is germane to the present analysis—things that the Ninth Circuit ignored.

This Court went on to characterize school children's recitation of the Pledge as one of the "illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage" that it had summarized. *Id.* at 677. The Pledge would constitute the latter—"a governmental sponsorship of graphic manifestations of that heritage." *Id.* Furthermore, this Court also used the Pledge and the other examples to explain why actions, which explicitly recognize or benefit religion do not always violate the Establishment Clause:

> This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. We have refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history.*" In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.
>
> Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, in

> reality, it establishes a religion or religious faith, or tends to do so. Joseph Story wrote a century and a half ago: "The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."

Id. at 678 (citations omitted).

Thus, had the Ninth Circuit read *Lynch* correctly, it would have understood that this Court has characterized the recitation of the Pledge by school children as a "governmental sponsorship of graphic manifestations of [our religious] heritage" that "confer[s] benefits or give[s] special recognition to religion," but that nonetheless does not violate the Establishment Clause. *Id.* at 677-78. Had the Ninth Circuit so understood *Lynch*, it could have (and *Amicus* argues should have) rejected the School District's argument that the religious content of the Pledge is minimal,[4] *Newdow*, 328 F.3d at 488, and yet upheld its use under the test from *Lee v. Weisman*, 505 U.S. 577 (1992), which Ninth Circuit employed.

Indeed, *Lynch* and *Lee* are in complete agreement that each Establishment Clause case must be decided based upon its own unique characteristics. Immediately after the passages quoted above, the *Lynch* Court noted that

> [i]n each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clause is not a precise, detailed provision in a legal code capable of ready

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[4] Similarly, this Court need not rely upon "ceremonial deism" or "civil religion" arguments.

> application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

Lynch, 465 U.S. at 613 (citations omitted).

Similarly, the *Lee* Court wrote that "our jurisprudence in this area is of necessity one of line-drawing . . . ." 505 U.S. at 598. It both distinguished its case from other Establishment Clause cases, *id.* at 596-96, and emphasized the unique features of its case, noting that

> [t]hese dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Id. at 586. Thus, *Lee* is self-limiting. The *Lee* Court went on to stress that "[e]veryone knows that in our society and in our culture high school graduation is one of life's most significant occasions." *Id.* at 594. The Court also explicitly pointed out that its holding did not apply to all state action involving religion:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity.

Id. at 597-98.

Because significant differences exist between the daily recitation of the Pledge of Allegiance and a "formal religious exercise" at one's once-in-a-lifetime high school graduation ceremony, there is no incompatibility between *Lynch's* strong support for the constitutionality of the daily recitation of the Pledge and *Lee's* holding of unconstitutionality of graduation prayers.[5] First, there is a difference between the Pledge which retains some religious content—indeed, as argued above, it retains significant religious content—and a formal religious ceremony including corporate prayer to the God that the Pledge merely acknowledges. Second, while the *Lee* Court believed that in a "fair and real sense" the graduation ceremony was obligatory, the daily recitation of the Pledge is voluntary, *Newdow*, 328 F.3d at 483.

This latter point deserves some clarification. At first blush, one might think the opposite is true. As the *Lee* Court pointed out, at least in *some sense*, participation in the graduation ceremony was voluntary, 505 U.S. at 583, whereas attendance at school is compulsory (and for many students, public schools are the only option). However, such an analysis would miss the point. What made the *Lee*

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[5] *Amicus* does not believe that *Lee* was rightly decided but recognizes it as a binding precedent of this Court. Therefore, *Amicus* believes that its reconciliation of *Lee* and *Lynch* is both valid and important to the proper resolution of the instant case.

graduation ceremony obligatory "in a fair and real sense" was that it was a stand-alone ceremony of great significance in the life of the graduates. They did not have to attend the ceremony to receive their diploma, but to fail to do so would have deprived themselves and their families of participation in a significant "rite of passage."

On the other hand, while the public school students of the Defendant School District are obligated to attend school, they are freely permitted to decline to participate in the Pledge. Thus, there is no obligatory ceremony at all, religious or otherwise. At worst, non-participating students might suffer "social isolation or . . . anger," which the *Lee* Court declared to be "the price of conscience or non-conformity." *Id.* at 598.

Because *Lynch* has so clearly spoken to the constitutionality of the use of the Pledge in public schools and because *Lynch* and *Lee* can re reconciled, the Pledge's religious content doe not render its use unconstitutional.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests this Court to reverse the Court of Appeals for Ninth Circuit and hold that the School District's policy is constitutional.

Respectfully submitted,
This 19th day of December 2003

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